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SOME SUGGESTIONS CONCERNING THE LAW OF FIXTURES.

There is no branch of the common law against which the charge of incoherency has been laid more frequently than it has against that involving questions of rights in "fixtures." The student, seeking for knowledge of the "principles" which will guide him to a solution of these questions, again and again runs across dispairing assurances that the law of "fixtures" "is in hopeless confusion," "the decisions are in irreconcilable conflict," "each case stands on its own basis and is decided according to its own peculiar equities." Yet there are no controversies that involve simpler legal questions or are resolvable by more easily comprehensible considerations of law than are disputes over rights in "fixtures." To indicate a solid pathway across this veritable slough of despond is the humble purpose of this article.[1]

There are some parts of our law that have been particularly favored dumping grounds for loose, inaccurate legal phraseology, careless definition of legal issues, artificial generalizations, and other such débris which in the course of the years have obscured the real criteria of judicial decisions and have unnecessarily rendered the law difficult of apprehension. The law of "fixtures" has been one of these dumping grounds. In order, therefore, that we may get a clear perception of the subject, let us first clear away the rubbish.

[1] It is not my purpose to present a complete detailed digest of the law of "fixtures;" nor have I the least intention of giving in classified order any considerable number of decided cases. Such an attempt would run beyond the narrow compass of a contribution to a legal periodical. Furthermore this work has been done adequately by our encyclopedias of law, and by Mr. Marshall D. Ewell in his excellent digest-text-book. My sole aim is what the title to this article indicates—the presentation of a few suggestions which may make the subject somewhat easier of comprehension.

The branch of the law treated under the title of "Fixtures" concerns controversies over rights in chattels which have become so closely associated in use with land or some improvement thereon that a question arises whether, for the purposes of adjusting the rights of the parties, they should not be treated as a part of the land. The term "fixture" itself has been used by judges and legal writers in various more or less definite senses.[1] Its natural etymological significance as a legal term is—a thing affixed to the land. This use of the word has been a very general one. Two other common uses may be defined as follows:

(1) A fixture is an article which was a chattel but has been annexed to land and become a part of it.

(2) A fixture is a chattel which has been annexed to land and which may be severed and removed by the party who has annexed it or his personal representative.

So varied and, in some cases, so undefined are the meanings which have been attached to the word that it would be vain to attempt to confine its use within the limits of one precise definition. For the purposes of this article the question what objects shall be labeled "fixtures" is immaterial. However, it is important for us to notice the matter of definition of the word "fixture" in order that we may record three facts:

(1) In examining the authorities, it is necessary to distinguish carefully between the different senses in which the word is used in order that what is said may be correctly understood.

(2) The law of fixtures as defined at the opening of this paragraph governs rights in articles which are not physically annexed to land and which, therefore, cannot be brought within many of the definitions of the term.[2]

(3) The decision of the question whether or not an article may be labeled a fixture is not necessarily conclusive of the question whether or not it shall be considered in law a part of the land.

Nothing so tends to confusion in any science as misuse or loose use of terms. The law of "fixtures" furnishes cogent evidence of the truth of this statement. Perhaps nothing has

[1] See Ewell on "Fixtures," Chap. I.

[2] For instance, a key to a house door, Liford's Case (1614), 11 Coke 50 b; Elliott *v.* Bishop (1854) 10 Exch. 496; or detached rolls of a rolling-mill, Voorhis *v.* Freeman (1841) 2 Watts & Serg. 116; or a mill-chain, Farrar *v.* Stackpole (Me. 1829) 6 Greenl. 154. Controversies over rights in buildings are generally treated as within the scope of the law of "fixtures," although some precise writers prefer not to classify buildings as fixtures.

done so much to obscure the subject as the use of the word "realty" as a synonym for "land" and the use of the word "personalty" as a synonym for "chattel." "Realty" and "real property" signify property rights which have certain legal incidents. Land is a subject of property rights both real and personal. A freehold estate in land is realty or real estate; an "estate" for years is personalty or personal property. "Chattel" may be used as a generic term to designate physical movable objects which are, with rare exceptions,[1] subjects of personal property rights.[2] This confusion of terms which is prevalent

[1] Rights in some chattels are descendible to the heir, Co. Lit., 18, b.: "And note, that in some places chattels as heire-loomes (as the best bed, table, pot, pan, cart, and other dead chattels moveable) may go to the heire, and the heire in that case may have an action for them at the common law, and shall not sue for them in the ecclesiasticall court; but the heire-loome is due by custome and not by the common law. And the ancient jewels of the crowne are heire-loomes, and shall descend to the next successor, and are not devisable by testament. An heire-loome is called *principalium* or *haereditarium*."

[2] In its widest sense the term "chattel" includes not only movable objects of property, but personal property rights in land such as estates for years, rights in growing crops, and liens. In the early days of the common law the modern distinction between objects of property rights and property rights themselves had not fully developed. The term property primarily signifies that which is one's own. In its early use it meant objects of property; and this is a common and proper use of the term to-day. The early conception of ownership demanded as an essential that the thing owned should be possessed. If a man had merely title or right to have a thing, but had no possession of it, he had merely a right of entry or a right of action—not a property right which he could convey or which would descend as such. If the right of action was a right of action for land, on his death his heir might prosecute it; but the right of action would not be property in the hands of the heir; he would prosecute the action as representative of his ancestor. Hence until the heir recovered possession of the land he had nothing which he could transmit to his heir. The heir of the person last seised, not the heir of the person who last might have had title or right to recover the land, was the person who at a given moment had the right of action. (See the able articles by Professor James Barr Ames on "The Disseisin of Chattels," in 3 Har. L. Rev.) In fact even to-day, in some jurisdictions a man who has title to land in the adverse possession of another in legal theory has no property in the land but a mere right of action based on a right of entry. In the absence of statute this right of action is untransferable, though in many jurisdictions an assignee may sue in the name of his assignor. Indeed by statute in some states an assignment of the right of entry or action is a criminal offense. (See on these points a careful article entitled "The Conveyance of lands by one whose lands are in the adverse possession of another," by George P. Costigan, Jr., in 19 Har. L. Rev. 267.) When incorporeal property rights came into existence, legal theorists classified them as things subject to rights of ownership and a metaphysical possession just as land was subject to ownership and actual possession. (See on the old conception of the "thinglikeness" of incorporeal rights Poll. and Mait. Hist. of Eng. Law. Vol. II., Book II., Chap. IV. p. 123. See also Blackstone's attempt to explain the nature of an incorporeal hereditament in Book II., Chap. III. of his Commentaries. His view evidently was that just as land is an actual

throughout not only the text-books on "fixtures," but also arguments of counsel and opinions of judges, abetted by careless analyzation, has conduced to a hazy perception of the real issues involved in the several types of cases with which the law of "fixtures" deals. It is generally assumed in treatises on "fixtures" and frequently by judges in their opinions that a point at issue in every controversy involving the law of "fixtures" is whether an article shall be classed as real or as personal property.[1] As a matter of fact this question is involved in but a very small proportion of the cases on "fixtures." When a controversy over

property thing that descends to the heir, so an incorporeal hereditament is an imaginary property thing—existing "merely in idea and abstracted contemplation"—likewise descendible to the heir. Of course what the heir really inherits in both cases is the property right; and the true distinction between an incorporeal property right and a corporeal property right is that in the one case the right does not entitle the owner to the possession of a physical object of property; and in the other case it does.) So terms for years, when they were raised to the dignity of an interest in land, were classified as things; and because having been originally covenants merely, they went on the decease of the owner to his personal representative and not to the heir, they were deemed things coördinate with movable chattels and were called "chattels real." Liens and rights in crops are, by a similar process of reasoning, sometimes grouped as "chattels" or "chattel interests." Even Blackstone, in his comparatively late day, failed to note (2 Bl. Com. 385-388) that a cow or a table, which are *objects* of personal property rights, is a thing of quite a different sort than a term of years or "chattel real" which is itself a property right in land. The modern legal conception of ownership as "a bundle of rights" gradually and tardily pushed its way to recognition as the logically necessary consequence of the development of incorporeal property rights and the waning importance of possession and seizin as essential elements of property in things.

The use of the words "realty" and "real estate" for "land" and of the words "personalty" and "personal property" for "chattel" are, of course, widely prevalent both in colloquial and in legal phraseology. The usage cannot be called incorrect; indeed in many cases it is commendable for conciseness—for instance, in such a statement as "A horse is personal property and goes to the personal representative of a deceased owner." However, this loose usage, scientifically speaking, should not occur when it tends to mislead or confuse either writer or reader. Language is a vehicle of thought; if we take the wrong car, it is not unlikely that we shall arrive at a wrong destination.

[1] "Tangible property is either real or personal. The former is land; the latter is all other tangible property. The law of fixtures deals with property whose status as realty or personalty is indeterminate until the proof of certain facts and the application of certain rules of law. When the status is thus determined, tangible property must be either real or personal. Fixtures then may be defined as tangible property whose status as realty or personalty is indeterminate. According as certain facts shall appear its status will become determinate and it will fall into one or the other category." 19 Cyc. 1035.

This fallacious definition into which a very learned and accurate authority on property law has been decoyed at the outset of a concise and suggestive digest of the law of fixtures, epitomizes the countless careless dicta of judges and text writers which have most thoroughly befogged the whole subject; and at the same time indicates the seductive capacity of the generally prevailing error which induced it.

articles used in connection with land arises between the personal representative and the heir of a deceased owner of a fee in the land, it becomes necessary for the court to decide the "status of the fixture as realty or personalty." In our modern common law the practical distinction between real and personal property, roughly speaking, is that real property goes to the heir and personal property to the personal representative to be distributed, after the payment of debts of the estate and expenses of administration, among the next of kin. Therefore when the court decides that a "fixture" shall go with the land to the heir its decision is in effect that the deceased owner's rights in the fixture were real estate. But rarely, except in a case of this type, is the "status of the fixture as real or personal property" of any practical concern whatsoever. A question at issue in a great majority of the cases is: Shall this erstwhile chattel, for the purposes of adjusting the rights of the disputing parties be treated as a part of the land, or as a separate and distinct object of property? That this is in practical effect quite a different question than that of "Realty or personalty?" may be clearly illustrated. Analyzed, a decision in favor of the heir in a controversy over "fixtures" between heir and personal representative of a deceased landowner in fee simple is: (1) the "fixture" is a part of the land; (2) it goes with the land to the heir. The "status" of the fixture as realty is an effect of the decision of point (2). As an original question it might have been argued that the decision of point (1) is not conclusive of the dispute between heir and personal representative in favor of the heir; for though things which are a part of the land generally go with the land in descent, this is not an invariable rule. Some *fructus industriales*, for instance, even before maturity, go to the personal representative and are classed as "personal property;" yet they undoubtedly are part of the land and pass as such under a deed or a devise of it unless excepted.[1] Nor is the point I am attempting to make a mere quibble of no material importance in the law of "fixtures." Failure to maintain a realization of this simple matter has been responsible for the difficulties in the way of comprehending the law of "fixtures" to an extent which can be appreciated only after a careful study of the cases.

One indication of the effect of this careless analysis is found

[1] See: Sherman *v.* Willett (1870) 42 N. Y. 146; McGee *v.* Walker (1895) 106 Mich. 521; Tripp *v.* Hasceig (1870) 20 Mich. 254; Stall *v.* Wilbur (1879) 77 N. Y. 158.

in the confessions sometimes made by judges of their inability to see how, "in accord with legal principles," rights of property in an object may be real as between certain parties and personal as between other parties under the same physical relation of land and "fixture;" or how the mere intention of the landowner can effect a change of realty into personalty or vice versa. Certainly an anomalous state of affairs would exist if a mere change in the character of the parties to a controversy made a difference in the legal criteria for deciding whether certain ownership rights are real or personal property; or if the courts gave effect to a specific intent of a property owner that some of his property, which in the absence of that intent would be considered personalty, be treated as realty or vice versa. Such a state of affairs does not exist in our law. "Fixtures" are not property of a chameleon-like character, now realty, now personalty. Nor does a specific intent of the property owner that his "fixtures" shall be treated as realty by the courts have that effect. Courts are not concerned with, nor does the law furnish an opportunity for classifying any given property right as real or personal except when it becomes necessary for the decision of a practical legal question to do so.[1] When the occasion does arise the decision is made according to very definite and simple rules. If the object is a "fixture" the owner's rights are treated as realty or personalty according as the "fixture" is considered a part of the land or not. The question whether or not the "fixture" shall be treated as part of the land is not decided by any cryptic, arbitrary, or technical rule, but by exactly the same criterion as that by which a court would decide whether or not the tires on an automobile are part of the automobile; or whether or not the shoes on a horse should pass as an "incident" under a sale of the horse; or whether or not a lot of stove pipe connecting a stove with a chimney hole should pass under a sale of the stove; —that is to say, the courts would decide these questions and do decide the analogous questions concerning "fixtures" in accordance with commonly prevailing mental conceptions and ideas. The man on the street would say that the tires of an automobile are part of it; that the shoes on a horse are practically regarded as part of the horse, and that, of course, if a man has sold a horse, as a consequence he has sold the shoes as well; that he

[1] Nor are courts concerned with, nor does the law furnish, an opportunity for classing objects as land or chattels except for the purpose of adjusting the rights of parties to a legal controversy.

wouldn't regard stove pipe as part of the stove, but as an additional subject matter of sale. The courts follow these conceptions of the layman in molding the law by their decisions. So also, the courts have taken account of the facts that land is seldom used without "improvements"[1] being made and that these "improvements" are generally regarded as "incidents" of the land and practically part of it; and they have developed the law of "fixtures" accordingly. An object which is properly within the commonly prevailing conception of a permanent "improvement" on land, or is a complementary part of an "improvement," is generally treated as a part of the land. Objects which cannot be brought within this commonly prevailing conception cannot be treated as part of the land. Common sense forbids that they should be so regarded. As we shall perceive later, the conclusive criterion whether or not a "fixture" is within the common conception of an "improvement" on land is in some cases the intent or lack of intent of the landowner to appropriate it to that use. The result is that the intent of the landowner sometimes does indirectly vitally affect the decision of the question "realty or personalty?" when that question is at issue; but the intent of the landowner which is of effect is not a specific intent that his

[1] By improvement, as I use the term in this article, I mean a permanent addition or accession to the land. The scope of the "commonly prevailing conception" of an improvement on land is fixed by common usage. An indication of the truth of the statement, that the criterion for deciding the "status" of a "fixture" is this commonly prevailing conception based on usage, is found in the history of the law of fixtures. There is evidence that in early times window glass went to the personal representative and not to the heir of a deceased land owner, "for a house is perfect enough, although it has no glass." (per Pollard, *arguendo* in Anonymous (1506) Year Book 21 Hen. VII. 26 pl. 4; 1 Gray's cases. 2nd. ed. 428.) That is to say, when window glass was not in common use, it was looked on as a luxury and of the nature of furniture. To-day window glass is so necessary a part of a completed house that it is doubtful whether it is not generally conceived of as having lost its identity as a separate object of property apart from the window sash which itself is an incorporated part of the house. As early as Queen Elizabeth's time the change in the common conception of the nature of window glass from furniture to part of the house in which it was placed ("for without glass it is no perfect house") had been registered clearly and conclusively by the courts. See Herlakenden's Case (1589) 4 Co. 62a, 63b. A more recent change in the scope of the common conception of a permanent accession to a building is indicated in the law of fixtures. Gas fixtures have been held to be presumptively chattels and not part of the house in which they are placed. Towne *v.* Fiske (1879) 127 Mass. 125; McKeage *v.* Insurance Co. (1880) 81 N. Y. 38. This rule which to-day strikes one as an anomaly, undoubtedly owes its existence to the fact that not so very many years ago gas fixtures were commonly regarded not as permanent additions to the house which a landlord usually furnished, but as furniture

right in a "fixture" shall be treated as realty or that it shall be treated as personalty.

Another cause of the superficial aspect of confusion which the law of "fixtures" wears is the ill-advised attempts which have been made to round up the law about certain artificial and arbitrary "presumptions." To that hackneyed and profitless dogma of medieval scholastics, "*Quidquid plantatur solo, solo cedit,*" we probably are indebted for these attempts. This phrase is recited and commented upon frequently as though the old common law was that anything annexed to the land became *ipso facto* a part of it and the modern law of "fixtures" had developed by a constantly growing number of exceptions to this general rule. It can be said with assurance that anyone who undertook to prove the soundness of such a theory by recourse to actual decisions would have an insuperable task on his hands. Like most of the other scholastic Latin maxims of the old days of the common law, this doleful motto is not a rule of judicial decision at all, but merely an inaccurate, pedantic generalization which never had any value except as a catch phrase to direct attention to the real legal principle; that is, the phrase calls attention to the fact that chattels may be used in connection with land in such a way as properly to be considered permanent "improvements" and part of it.[1] Yet we find it stated by judges and text writers in varying language that "the general rule" of the law of "fixtures" is this "maxim of antiquity" which "is applied with more rigor in favor of the inheritance, as between executor and heir, than in the relations of landlord and tenant and tenant for life or in tail and remainderman or reversioner;" and that "in the absence of evidence of specific intention varying the rights of the parties, the same strict rule which prevails between heir and executor, prevails also between the grantor and grantee, and mortgagor and mortgagee of the land." This clarifying statement of the basis of the law leaves one to ponder what peculiarity in the characters of the executor, grantor and mortgagor there is which causes them to be treated with greater harshness in the application of a legal rule than the other classes of parties

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[1] "No doubt the maxim '*quidquid plantatur solo, solo cedit*' is well established; the only question is what is meant by it. It is clear that the mere putting a chattel into the soil by another cannot alter the ownership of the chattel. To apply the maxim, there must be such a fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil." (per William J. in Lancaster *v.* Eve. (1859) 5 C. B. (N. S.) 717, 727; 28 L. J. C. P. 235; 5 Jur. (N. S.) 683.)

mentioned; and further as to the exact extent to which the courts will proceed in their variably rigorous wielding of this scimiter of justice, in each of the several types of cases. I hope to demonstrate before I have done that if there is any variation in the law governing the several types of cases, this variation is not due to a "relaxing of the rigor" of one arbitrary rule in favor of certain parties, but to a difference in the questions at issue and in the natural considerations by which these questions are resolvable.

The "presumptions" to which I have referred above, and which sometimes have been advanced tentatively are (1) that chattels which have been physically annexed to land have become *prima facie* a part of it and (2) that chattels which are not so annexed but are used in connection with the land are *prima facie* not a part of it. I submit that to raise a presumption in favor of holding an object a part of the land merely because of the fact that it is physically annexed thereto is logically unsound and is not supported by authority. Take for instance the case of an ordinary heating stove set up in a dwelling house, fastened firmly to the floor and connected with the chimney hole by stove-pipe. No lawyer conversant with the law of "fixtures" would concede for a minute that there would be a presumption that the stove was part of the land.[1] Indeed, in the absence of evidence to the contrary, a presumption would arise that the stove was furniture and a movable chattel. It may be argued in opposition to the pertinency of this illustration that the mere annexation of the stove abstracted from the concomitant facts would raise a presumption that the stove was part of the land, but that this presumption would be rebutted by these other facts, e. g. the character of the article, its use, and the manner of its annexation. My answer to this argument obviously is that the abstract fact of annexation never occurs without other concomitant facts—e. g. the nature of the article and the manner of annexation—which are of far greater persuasive force in directing a determination in one way or the other of the question whether or not the "fixture" comes within the common conception of an "improvement" than is the colorless fact of annexation; and that therefore there is no reason for raising this arbitrary presumption. Annexation of a chattel in a permanent

[1] Freeland *v.* Southworth (1840) 24 Wend. 191. Of course a stove conceivably may be so permanently affixed to land and so used as to raise a presumption of fact that the landowner considers it a permanent accession. Goddard *v.* Chase (1811) 7 Mass. 432.

and substantial manner, in the light of the nature and use of the article, does often raise a strong presumption in favor of holding it a part of the land; but such a presumption is always what is termed a "presumption of fact"—i. e. it is raised because the evidence has become so strong in favor of that view as to persuade a reasoning mind to decide in accordance with its trend. For a similar reason, if no other facts concerning an object over which parties were litigating were introduced in evidence than that it was originally a chattel and was now used (in some unannounced manner) in connection with land, but without the existence of any physical connection between it and the land, the "presumption" would be that the object was not an "improvement." This presumption would not arise merely because of the fact that the object was not physically annexed to the land, but because there would be no evidence from which legitimately a conclusion that it had become an "improvement" might be deduced. An attempt to revolve the law of "fixtures" about the axis of these "presumptions," far from resulting in a demonstration of the common sense criteria which govern the judicial decisions, distracts attention from them.[1]

Now that we are forewarned of Scylla, Charybdis, and the voices of the Sirens, let us see if we can steer steadfastly to a clear view of the law of "fixtures."

Objects of property which are used in connection with land may be divided into three classes:

(1) This class includes objects which, either because of

[1] We owe such attempts to a zealous, but mistaken and impractical notion which seems to be entertained by some of our legal theorists that the common law may be stunted to a "scientific" system of rules of thumb which can be memorized as students memorize mathematical formulæ, and applied by the ordinary human intelligence with a minimum of wear and tear on the brain tissues. The affairs of society never were nor ever can be adjusted successfully by the use of an *a priori* yard stick, nor through the agency of judges (even assuming that some genius had invented a process for growing them) who are mere infallible measuring automatons. Sound judgment, based on a knowledge of the world we live in and the practical considerations which are involved in the controversies to be decided, must give proper form and substance to our common law, which is only too often concealed rather than revealed by the stereotyped rule in the book, if it is to prove its worth as a practical and efficient social machine and hold the pace of civilization.

In this connection it may not be amiss to call attention to the fact that judges are engaged in deciding practical questions and dispensing justice, not in elaborating legal theory; and that since it may be one thing to make a sound decision of a controversy and another and a very difficult matter to explain correctly that decision in accepted legal jargon, we frequently must look behind the conventional wording of the opinion for the real considerations that have dictated the disposition of the case.

their peculiar nature, or the manner of their use in connection with the land, or both, cannot be held to have become mere "improvements" on the land, without running counter to commonly prevailing conceptions. Cattle, horses, and other domestic animals are never regarded as "improvements" on land; therefore the law never treats them as such.[1] A threshing machine hauled out into the fields and there used at the proper season would not be regarded commonly as an "improvement," no matter what the intent of the owner might be. The manner of its use would prevent it from coming within the class of things which common sense treats as possibly "improvements;" therefore the courts would always decide a threshing machine used in this manner to be necessarily a chattel.[2] Objects which come within class (1) are always and for all purposes treated as chattels, separate and distinct from the land.

(2) This class includes objects which, because of their physical incorporation into either the land itself or some "improvement" thereon,[3] according to commonly prevailing mental conceptions have lost their identity as separate and distinct objects of property and hence have become necessarily a part of the land. A brick in a wall is not commonly conceived of as a separate object, but as a part of the wall; a board fitted into a

[1] "We can conceive of no circumstances under which chairs, tables, movable desks, stoves, tools, and ordinary vehicles could be classed as fixtures at all, and counsel disclaim any such idea. It would be possible for pipes, large bellows and perhaps fixed scales to be so treated if attached in such a manner as to form part of the fixed property. But movable pipes, or anything else, which are in fact moved from time to time, and used for different purposes and in different places, could hardly be so considered. The court below could not, as matter of law, hold any of the property in dispute as necessarily fixtures. At best it was of ambiguous capacity, and might or might not be so regarded. There was no great conflict of testimony in this case concerning the uses of the various items of property, and we think the court gave the jury correct instructions on the whole subject." Campbell, J. in Scudder *v.* Anderson (1884) 54 Mich. 122.

[2] On the other hand, if the threshing machine were set up in a permanent manner—fixed by bolts and screws to posts let into the ground, for instance—it could not be said that it would be impossible to treat the machine as an "improvement" on the land. It is not an object of such a nature that it can never be used as an "improvement;" and the manner of its use in the case assumed would bring it within the class of objects which can be conceived of as "improvements." Wiltshire *v.* Cottrell (1853) 1 El. & Bl. 674.

[3] A great proportion of the decided cases on the law of "fixtures" really involve the question whether or not the object in litigation shall be treated as part of some "improvement" on land; and do not involve the question whether or not the object shall be treated as directly incorporated, either in law or fact, into the land itself. Of course if the object is part of an "improvement" on the land, it is an accession to part of the land.

floor is not commonly conceived of as an object distinct from the rest of the floor; the ink forming the printed letters on the page of a book is not thought of as an object of property distinct from the book. In all these instances it is true that the objects incorporated are still distinguishable by the senses and that it is possible (excepting the case of the ink forming the printed letters in the book) to restore to them their separate physical identity by "severance;" but practically they are thought of before actual severance as merged in the objects into which they have been incorporated. If these last mentioned objects are land or "improvements" on land the incorporated objects become, according to common conceptions, necessarily part of the land. Apparently the law of "fixtures" treats objects falling within this class as always and for all purposes a part of the land before actual severance.[1]

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[1] "Counsel for the defendant greatly rely upon the case of Woodruff & B. Iron Works *v.* Adams 37 Conn. 233. An examination of that case shows that it was decided upon the ground that the property in controversy was so attached to the building as to lose its identity. The same is true of the case of Fryatt *v.* Sullivan Co. 5 Hill 116 affirmed by the Court of Errors, 7 Hill 529 also relied on by counsel for defendant. The principle of these cases will apply where boards, timber, brick or stone, are incorporated in a building. They necessarily become a part of the building, and thus lose their identity as personal property." Lyon, J. in Walker et al. *v.* The Grand Rapids Flouring Mill Co. (1887) 70 Wis. 92 at p. 97.

"It is conceded that there must necessarily be a limitation to this doctrine, which will exclude from its influence cases where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy. Thus, a house or other building, which from its size or the materials of which it was constructed, or the manner in which it was fixed to the land, could not be removed without practically destroying it, would not, I conceive, become a mere chattel by means of any agreement which could be made concerning it. So of the separate materials of a building, and things fixed into the wall, so as to be essential to its support; it is impossible that they should by any arrangement between the owners become chattels. The case of Fryatt *v.* The Sullivan Co. (5 Hill 116) was correctly decided upon this distinction." Denio, J. in Ford *v.* Cobb (1859) 20 N. Y. 344 at p. 350.

See also the dictum of Mitchell, J. in Binkley *v.* Forkner et al. (1888) 117 Ind. 176 at p. 181, and again at p. 185; Fryatt et al. *v.* The Sullivan Co. (1843) 5 Hill 116; aff. 7 Hill 529.

It may be a difficult matter in some cases to decide whether an object of property falls into class (2) among those things which are incorporated in fact into the land or some improvement thereon, or whether it still retains its separate identity so that it may be treated as a chattel or an "improvement" according as the landowner indicates. For instance into which class does a large modern apartment house or a sky-scraper office building fall? Removal without destruction is impossible. If it is removed from the land it must be removed not as a building but as so much building material. Since it cannot be put to use as property apart from the land on which it stands without change in identity, should it not be treated as necessarily merely a part of the land? The dicta

(3) Between class (1) and class (2) lies class (3). This class includes all objects which are of such a character and are so used in connection with land or some "improvement" on land that commonly prevailing mental conceptions permit of treating them as part of the land; but which are not actually merged into the land or some "improvement" on it in such a way as to prohibit regarding them as separate objects of property. For instance, a key to a door of a house is an object of property separate and distinct from the house; yet its use is so specially connected with that of the house that common sense treats it as merely an accessory to the house. So a machine firmly annexed to land and specially appropriated to use in connection with the land or some "improvement" on it *may* be treated as a separate object of property; but there is nothing in common sense which forbids treating it as part of the land or of the "improvement." In the case of objects in this class, the conclusive determination of the question whether or not common sense would call the thing an "improvement" naturally depends on the intent of the "landowner."[1] The law of "fixtures" follows common sense and

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quoted above seem to indicate a tendency on the part of the courts to put a building of this sort in class (2). A building removable without demolition may be treated either as a part of the land or as a chattel as the rights of the parties concerned may demand. Dist. Township of Corwin *v.* Moorehead (1876) 43 Ia. 466; Brown *v.* Corbin et al. (1889) 121 Ind. 455; Lipsy *v.* Borgmann (1881) 52 Wis. 256; Dooley *v.* Crist (1861) 25 Ill. 551.

[1] "This property, it will be borne in mind, is the legitimate subject for fixtures, and is that class of property about which the law permits parties to contract so as to control, as between themselves, its character, after being affixed, making it either personal property or real estate. The mortgaging of it as personal property would, as between the parties, and those having notice thereof, make it such. Of course, a different rule would obtain, in relation to bricks, lime, boards, beams, etc., used in constructing a house; these, by such use, lose their individuality and become absorbed in, and made a part of, rather than simply annexed to, the real estate." Cole J. in Sowden *v.* Craig (1868) 26 Ia. 156 at p. 164.

"But most of the American authorities agree that the question of intention of the party or parties affixing the machinery enters into the elements of each case. The permanency of the attachment, and its character in law, do not depend so much upon the degree of physical force with which the thing is attached, or the manner and means of its attachment as upon the motives and intention of the party in attaching it. If the intention is that the articles attached shall not by annexation become a part of the freehold, as a general rule they will not. The exception is where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy (Ford *v.* Cobb 20 N. Y. 344); as when the property cannot be removed without practically destroying it, or when it, or part of it, is essential to the support of that to which it is attached." Manwaring *v.* Jenison (1886) 61 Mich. 117 at p. 134. See also: opinion of Folger, J. in Tifft *v.* Horton (1873) 53 N. Y. 377; opinion of Mitchell, J. in Binkley *v.* Forkner (1888) 117 Ind. 176.

As it is sometimes a difficult matter to decide whether an object

therefore the intent of the landowner is the criterion where no conflicting rights of others dictate a contrary result. Since, however, objects in this class can be treated as separate articles of property without violating common conceptions, they will be so treated even in opposition to the actual intent of the landowner, wherever such a course is necessary to effect practical justice between the parties concerned.

The great majority of controversies over rights in "fixtures" concern objects which fall within class (3). The remainder of this article will be devoted to a discussion of the law governing rights in "fixtures" of this kind.[1]

In the leading case of *Teaff* v. *Hewitt*,[2] the following formula for determining whether or not a "fixture" has become a part of the land was evolved by Bartley, C. J.:

"The united application of the following requisites will be found the safest criterion of a fixture:

(1) Actual annexation to the realty or something appurtenant thereto. (2) Appropriation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the

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should be placed in class (2) or in class (3), so it is also frequently a difficult question to decide whether an object falls within class (3) or in class (1). There has been considerable discussion and variation in judgment displayed in the cases respecting articles not annexed to land at all or only slightly annexed thereto, but so appropriated to use on the land in question that an argument might be made that they fall within the common conception of an "improvement." Some judges in their opinions have shown a tendency to require permanent and substantial annexation as an essential requisite of an article in class (3); others have adopted a more liberal attitude and required a less firm and substantial annexation, regarding the manner of annexation as an important but not all-important matter of consideration in deciding the question. Either by way of exception, distinction or otherwise, all agree, however, that "constructively" annexed objects, such as keys and temporarily severed parts of some improvement. can be treated as part of the land. See, Teaff *v.* Hewitt (1853) 1 Oh. St. 511; Walker *v.* Sherman (1839) 20 Wend. 636; Voorhis *v.* Freeman (1841) 2 Watts & Sergeant 116; Farrar *v.* Stackpole (Me. 1829) 6 Greenl. 154; Snedeker *v.* Warring (1854) 12 N. Y. 170; and further my discussion of the criterion suggested by Judge Bartley in Teaff *v.* Hewitt in the text of this article.

The question involved is not one of criterion but of mere judgment in applying the accepted criterion—the commonly prevailing conception of an "improvement" on land. In close cases there is room for a difference of opinion as between individual judges which will be reflected in a corresponding slight difference in the aspect of the cases decided by their respective courts. The variation in the net results of actual decisions, however, I believe will be found upon careful examination to be of no serious magnitude. The tendency is constantly toward the more liberal view of the matter.

[1]All that need be said concerning "fixtures" in class (2) and objects in class (1) is that objects in class (1) are always treated as chattels, while objects in class (2) are always treated as part of the land until actually severed.

[2](1853) 1 Oh. St. 511, 530.

annexation, to make the article a permanent accession to the freehold —this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made."

In essence this is an attempt to define the requisites of a "fixture" which shall fall within the common conception of an "improvement" on land. Obviously the definition does not include and it was not intended to include those accessories regarded as part of some "improvement" on land which are not physically annexed and which Judge Bartley therefore refused to label "fixtures." It should be noted also that objects coming within class (2) of my classification are part of the land regardless of the intent of the annexer or of the landowner. Limited in its application to physically annexed objects not in class (2) of my classification, and with its third requisite slightly amended in a manner to be noticed presently, this formula is a pretty good digest of considerations material for determining whether or not an object within its scope is an "improvement." If the object is annexed to the land "or something appurtenant thereto" and if it is appropriated "to the use or purpose of that part" of the land with which it is connected, probably it is safe to assert that it falls within class (3) of my classification—that is to say it *can* be treated as part of the land without violating common sense. The question whether or not it *shall* be so treated depends on whether or not it fulfills the third requisite of the formula. Judge Bartley makes his third requisite the intention of the party making the annexation.[1] But frequently, when the annexer and

[1] There has been a great deal of discussion in the cases as to the relative importance of "annexation" and "intent" in the determination of whether or not an object is part of the land. A good part of the apparent diversity of opinion on this point may be dissipated, I think, by the explanation, that the opinions in which stress is laid particularly on the manner of annexation of the object as the consideration of chief importance and those in which the intent of the landowner or of the "annexer" is hailed as the criterion, are frequently discussing different questions.

As I indicate above, the manner of annexation of the object is of prime importance in determining whether or not the object falls within the class which may be treated as part of the land or of some "improvement" thereon without running counter to commonly prevailing conceptions. Leaving out of consideration the cases of "constructive annexation," which I shall discuss presently, it may be said that annexation is a requisite of an object in class (3). As a general rule we do not regard detached objects as part of the land on which they happen to be. The object must wear the aspect of a permanent accession to the land; hence some sort of annexation, not necessarily so substantial perhaps as some of the dicta would have us believe, (as in Snedeker *v.* Warring (1854)

the "landowner" are not the same person, the will of the landowner prevails over that of the annexer. For instance, if a trespasser annexes a chattel to the land in such a manner that if chattel and land belonged to the same person "the reasonably presumable intent"[1] would be that it was an "improvement,"[2] the trespasser cannot reclaim the article as a chattel against the will of the landowner.[3] On the other hand the intent of the annexer frequently prevails over that of the landowner. For instance, if a licensee of the landowner annexes a chattel to the land under an agreement that it shall remain the chattel of the licensee, the landowner will not be permitted to claim that the chattel is part of the land.[4] Again, sometimes the combined intentions of the landowner and the annexer that the article shall remain a chattel will be ineffective to prevent a third person claiming the article as part of the land. For example, if a licensee annexes a chattel, with the understanding that it shall remain his chattel, to land of the licensor in such a manner that if chattel and land were owned by the same person, the "reasonably presumable intent" would be that it was an "improvement," and the licensor then conveys the land to an innocent purchaser for value without notice of the licensee's rights, the vendee (in most jurisdictions) may claim the article as part of the land.

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12 N. Y. 170 it may be annexation by weight of the object merely) is generally necessary. The manner of annexation is also important evidence of the actual or "reasonably presumable" intent of the landowner.

The intent of the landowner is of no importance whatsoever on the question whether or not the object falls into class (3); his intent cannot effectively run counter to the criterion which the law has laid down for determining that question. If the object does fall into class (3), however, the landowner's actual or his "reasonably presumable" intent in many cases is the sole consideration in determining whether or not the object *shall* be treated as part of the land.

When judges, in their opinions, lay stress on the prime importance of annexation as a test, usually they are discussing the first question mentioned; when they speak of the "intent of the parties" as the controlling element, they are discussing the second question.

[1] By the phrase "reasonably presumable intent," which I have adopted from Professor Finch's notes in his "Selected Cases on the Law of Property in Land," I mean the conclusion which one ignoring the actual intent of the landowner would arrive at as to his purpose from a consideration of all the facts which, as between the parties to the controversy in question, legitimately may be taken into account.

[2] Elsewhere in this article, for reasons of convenience, I refer to an object in this situation with respect to land by the terms "presumptive improvement" or "apparent improvement."

[3] See cases cited under II. farther on.

[4] In other words the landowner (to use a hackneyed phrase which frequently is erroneously employed as though it denoted a reason for a decision rather than an effect of it) is estopped to set up his actual intent to overcome the result of his agreement, express or implied, with the chattel claimant. See cases cited under IV. farther on.

As far as the land-owner-vendor is concerned, this result is based on that very general rule of "construction" which prevents a party to a contract or a conveyance for value from effectually setting up his secret intent in order to modify the effect of the contract or conveyance construed in the light of the facts and circumstances with knowledge of which at the time the transaction took place, both parties are chargeable. As far as the chattel claimant is concerned, the result is based on the policy of our statutes requiring the recording of certain agreements and conveyances affecting rights in land.[1] On the whole it seems to me that the most natural and the simplest way to state the third requisite is: (3) The intention of the landowner[2] to make the article an "improvement" on land, except in a case where a superior conflicting right of some other party against either land or chattel, or the policy of the recording acts, or a certain rule of "construction" (noted above), dictates that the actual intention of the landowner be ignored. When this is the case, the "reasonably presumable intent" of the landowner is the criterion for determining whether or not the object shall be treated as part of the land for the purpose of adjusting the rights of the parties, except when a claimant with rights in the "fixture" as a chattel valid against the person who was the landowner at the time of annexation is enforcing them against this person or a person other than a purchaser for value without notice of the land, claiming under him. In deciding a controversy of this last type, the article is treated as a chattel.[3]

Attempts frequently have been made to modify Judge Bartley's formula so that it would include within its scope those unan-

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[1] See cases cited under VI. and IX. farther on.

[2] By "landowner" I mean to designate the person having such a present estate in land as gives him the right to control the making of "improvements."

[3] These unattached accessories or "constructively annexed fixtures" include objects such as a house key, Liford's case (1614) 11 Coke 50 b; a mill-chain, Farrar *v.* Stackpole (Me. 1829) 6 Greenl. 154; extra rolls to a rolling mill, *Ex parte* Astbury (1869) L. R. 4 Ch. 630; Voorhis *v.* Freeman (1841) 2 Watts and Sergeant 116; a mill-stone removed to be picked, Wiston's Case of Gray's Inn (1522) 14 Hen. 8, 25 pl. 6; detachable wheels belonging to a polishing machine, Pierce *v.* George (1871) 108 Mass. 78.

In Bishop *v.* Bishop (1854) 11 N. Y. 123, hop poles piled up in a yard between seasons were held to pass with the land under a mortgage thereof. The poles, of course, constituted the whole "improvement" in this case. The facts that their use was not continual and that therefore they were detached during part of the year, did not prevent the court from holding them a part of the land.

nexed accessories to "improvements" on land which are treated as part of it. The amendments usually made are an alteration of the first requisite to "actual or constructive annexation" and a substitution of "special adaptation" for "appropriation" in the second requisite. An article is never "constructively annexed" to land unless in law it is treated as part of it. Therefore, "constructive annexation" is clearly not a prerequisite to, but a result of, holding an object to be a part of the land. Furthermore, though "special adaptation," in a rather indefinite degree, is generally a characteristic of unattached accessories to land,[1] and though it is always strong evidence of intent to make the object an accessory, it is not a characteristic of all "improvements" on land. For instance, buildings, one of the most common kinds of "improvements," are generally not "specially adapted" to the land on which they are used; and again, it cannot correctly be said that machinery "improvements" are "specially adapted" to the use of the building in which they are located. It is better to make a separate digest of specifications for an unannexed accessory. In order that an unannexed object (other than a temporarily detached "improvement" or component part of an "improvement" which is treated as part of the land as of course[2]) may come within class (3) of my classification, it must be "specially adapted" to and complementary of some "improvement" on the land. If it meets these requirements, whether or not it shall be considered a part of the land is determined by the same rules as determine the question for annexed articles in class (3).

It is sometimes assumed by writers on the law of "fixtures" that after a chattel has once been annexed to land in a substantial and permanent manner as an "improvement," there is some technical difficulty in the way of treating it as a separate object of property again before some act of physical severance has occurred. With respect to articles falling within class (2) of my

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[1] This "simple" statement illustrates the futility of generalization in such a matter. Even in this labyrinthian form the rule is not an accurate digest of the law for all jurisdictions. For instance, in New York a chattel claimant with rights valid against the person who was the landowner at the time of annexation may enforce his claim even against a subsequent purchaser of the land (I use this term with a broad meaning) for value without notice. Furthermore, before its effect can be understood, it must be interpreted and elucidated. For the interpretation and elucidation see pp. 20 et seq.

[2] Bishop *v.* Bishop (1854) 11 N. Y. 123; Goodrich *v.* Jones (N. Y. 1841) 2 Hill 142; Wadleigh *v.* Janvrin (1860) 41 N. H. 503.

classification this difficulty clearly is well conceived. An object incorporated in fact into another cannot cease to be part and parcel of the object into which it has been merged before some act has restored to it its separate identity. With respect to those articles which have not become merged into land in fact, however, the difficulty is fanciful and scholastic. "Improvements" in this class are considered part of the land, (1) because they are so particularly and exclusively appropriated to use in connection with and on the land that to consider them "improvements" will not run counter to common sense, and (2) because it is the actual or the "reasonably presumable" intent of the landowner that they shall be so treated. The intent of the landowner, actual or "reasonably presumable," was the thing which decisively made them part of the land; why should not the same important criterion settle the question whether or not the article shall now be treated as a separate thing? The courts, with but infrequent exceptions, admit that "constructive severance" is sufficient to justify treating an "improvement" in class (3) as once more a separate object as far as the rights of the parties consenting to the "constructive severance" are concerned.[1] Parties not agreeing to it may, in some cases, prevent

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[1] See: Manwaring *v.* Jenison (1886) 61 Mich. 117; Tyson *v.* Post (1888) 108 N. Y. 217; Fortman *v.* Goepper et al. (1863) 14 Oh. St. 558; Fuller *v.* Tabor (1855) 39 Me. 519; Shaw *v.* Carbrey (1866) 13 Allen 462 (dictum).

Contra: Gibbs *v.* Estey et al. (1860) 15 Gray 587; Burk *v.* Hollis (1867) 98 Mass. 55. These Massachusetts cases are based on unsatisfactory reasoning and should not be followed. Both cases might have been decided as they were on the ground that the chattel claimant's rights are invalid in Massachusetts against a subsequent grantee of the land for value without notice. Nevertheless it cannot be said that they contain mere *dicta* on the point under discussion.

The case of Richardson *v.* Copeland, 6 Gray 536, also is sometimes cited as an authority contra to Tyson *v.* Post and Manwaring *v.* Jenison. It has no bearing whatsoever on this question. The purchaser of the land at the judicial sale acquired all the property covered by the mortgages which encumbered the land at the time the steam engine and boiler were placed upon it. The judicial sale foreclosed these mortgages. The engine and boiler were attached to the land in such a manner that according to the Massachusetts rule they became subject to the lien of the prior land mortgages (See under VIII. farther on). Therefore in spite of the fact that the purchaser of the land took with notice of the chattel claimant's rights and in spite of the combined intent of the land mortgagor and the chattel mortgagee the "fixture" of course, passed to the land purchaser under the mortgage foreclosure sale. It is true that the opinion of Chief Justice Shaw, read apart from the facts of the case, gives countenance to the view that it stands for a rule in accord with Gibbs *v.* Estey et al. and Burk *v.* Hollis; but such a method of interpreting a decision is not lawyer-like. The case, properly interpreted is not of the same effect as Gibbs *v.* Estey and Burk *v.* Hollis.

it from affecting their superior claims through principles which I have already indicated.[1]

Let us now consider briefly the considerations involved in some of the principal types of controversies over rights in "fixtures."

I. *Chattel Claimant vs. Owner of Land to which Chattel Has Been Annexed Without Chattel Claimant's Consent or Fault.*

The question in this type of case obviously is: Shall the chattel claimant be permitted to reclaim his chattel, or shall he be compelled to fall back on his remedy for damages?[2] Generally speaking, if an owner of a chattel loses control of the chattel through the wrongful act of another, he can follow and reclaim it specifically at least as long as it retains its identity and character as the chattel he has lost.[3] If it loses its identity through merger into another object of property belonging to some one else, he can no longer reclaim it specifically, but must resort to his remedy for damages against anyone who may have invaded tortiously his property right.[4] Under these general rules, if the chattel comes within class (2) of my classification—i. e., has been merged into the land or some "improvement" thereon as a matter of fact,—of course the chattel claimant cannot recover

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A sale and transfer of title to a building apart from the land on which it stands does not necessarily convert the building into a chattel. If the parties treat the transaction as a conveyance of land, the grantee will hold title to the building as part of the land, and not as a chattel. Eddy *v.* Hall (1881) 5 Colo. 576.

Of course a mere intent of the landowner to remove a building from land will not *ipso facto* work a constructive severance of the building. There must be something to show that the building is regarded as a chattel. People *v.* Jones (1899) 120 Mich. 283.

[1] See page 17 supra.

[2] The law of fixtures in some of its phases presents questions of the kind which are usually treated under the topics Accession, Specification, and Confusion. The law on these subjects may be found, succinctly digested in Mr. William T. Brantly's little book "Principles of the Law of Personal Property," Chapters XIV. and XV. The propositions contained in the next two sentences *supra* are a statement of so much of it as is necessary for our discussion. We are not concerned with the right of a chattel claimant to goods which merely have been changed in character through the wrong of another (specification); or which have become untraceable through intermingling with another's goods of the same kind (confusion).

[3] See: Perkins *v.* Bailey (1868) 99 Mass. 61; White *v.* Twitchell (1853) 25 Vt. 620; Cross *v.* Marston (1845) 17 Vt. 533.

[4] See: Merritt *v.* Johnson (1811) 7 Johns. 473; 5 Am. Dec. 289; Brantly, Pers. Prop. § 154.

it specifically.[1] But suppose the chattel falls within class (3) —why should not the chattel claimant be permitted to recover it even though the landowner chooses to treat it as part of the land? It has not lost its identity either by change of character or by merger into another object. It may be treated as a part of the land, it is true; but it need not be. It would seem that there is no good reason in common sense why the chattel claimant's right to follow and reclaim his chattel should not be extended to this case; and obviously, if my discourse has been understood, there is no technical reason.[2]

II. *Chattel Owner who Has Annexed His Chattel to Another's Land Without That Other's Consent or who Has Acquiesced in Such Annexation vs. Landowner.*

In this type of case the chattel becomes annexed to the land by an invasion of the property rights of the landowner to which the chattel claimant is a party. The question is whether or not he may reclaim his chattel from the land against the will of the landowner. If my chattel is on my neighbor's land through my fault, I, lacking his consent, cannot enter to take it without becoming a trespasser. However, in the ordinary case, I do not lose my property in the chattel.[3] But suppose the chattel is so placed and so used that if chattel and land belonged to the same party, the presumption (based on ordinary usage) would be that it was part of the land—shall the chattel claimant be permitted to retain his property in the object in such a case as this, or shall the will of the landowner to retain it as an "improvement" on

[1] Jackson *v.* Walton (1855) 28 Vt. 43; Detroit etc. R R. Co. *v.* Busch (1880) 43 Mich. 571; Woodruff and B. Iron Works *v.* Adams (1870) 37 Conn. 233; Pierce *v.* Goddard (1839) 22 Pick. 559; Ricketts *v.* Dorrel (1876) 55 Ind. 470.

[2] Cross *v.* Marston (1845) 17 Vt. 533 (semble); Crippen *v.* Morrison et al. (1864) 13 Mich. 23 (semble); Walker et al. *v.* Grand Rapids Flouring Mill Co. (1887) 70 Wis. 92 (semble); Gill *v.* De Armant et al. (1892) 90 Mich. 425; Shoemaker *v.* Simpson (1876) 16 Kan. 43.

But see Reese *v.* Jared (1860) 15 Ind. 142. This case evidently is based on an erroneous deduction from a quotation from Chancellor Kent's Commentaries to the effect that if a landowner uses materials of another in erecting a house on his land, the owner of the materials cannot follow them specifically but must rely on his action for damages. This is the basis of Judge Wilde's opinion in Pierce *v.* Goddard (1839) 22 Pick. 559. The reason in this rule is plain: the materials have lost their identity in fact by their incorporation into the new house. It is an entirely different thing to say that a man may make a completed house belonging to another his by simply attaching it to his land.

[3] See: Holmes *v.* Tremper (1822) 20 Johns. 29.

his land be given effect? The courts, in condemnation of so gross an invasion of the rights of the landowner, decide in his favor.[1]

III. *Chattel Claimant who Has Annexed His Chattel to Land While in Adverse Possession vs. Owner of Better Title to Land who Has Recovered Possession.*

This type differs from the preceding in that the chattel claimant, at the time of annexation was the owner of the land—i. e., had seizin—though under an inferior title. The rule is the same. The holder of the better title, getting possession of the land by paramount right, may hold against the chattel claimant "fixtures" which apparently were meant for "improvements."[2] In this class of cases we have a technical argument, however, to assist whatever considerations of public policy there may be in favor of the established rule. Since the chattel claimant was technically owner of the land at the time he annexed his chattels and was claiming the rights of an owner, chattels apparently intended as "improvements" should clearly be regarded in that light during his occupancy of the premises and the holder of the paramount right to the land upon gaining possession on technical grounds should get these "improvements" as well, as part of the land.

IV. *Chattel Claimant Whose Chattel Has Been Annexed to Land With Consent of Landowner that it Shall Remain a Chattel vs. Landowner; or vs. Those Claiming Under Him Not Purchasers for Value Without Notice, and Not Prior Mortgagees, of the Land.*

In this type of cases the only question is: Shall the rights of the chattel claimant to his property be maintained by the courts

[1] Ritchmyer *v.* Morss (N. Y. 1867) 3 Keyes 349; Inhabitants of First Parish of Sudbury *v.* Jones et al. (Mass. 1851) 8 Cush. 184; Merriam *v.* Brown et al. (1880) 128 Mass. 391.

That neither the chattel claimant nor the annexer has intentionally violated the rights of the landowner makes no difference in the rule. The law requires a man at his peril to ascertain the ownership of property with which he meddles.

Seymour *v.* Watson (Ind. 1841) 5 Black. 555; Burlerson *v.* Teeple (Ia. 1850) 2 Greene 542; Kimball *v.* Adams (1881) 52 Wis. 554 (Case might have gone on ground that other party was purchaser of land for value without notice).

Cf: Hines *v.* Ament (1869) 43 Mo. 298; Lowenberg *v.* Bernd (1871) 47 Mo. 297; Matson *v.* Calhoun (1869) 44 Mo. 368.

[2] Huebschmann *v.* McHenry (1872) 29 Wis. 655; Bracelin *v.* McLaren (1886) 59 Mich. 327; Doscher et al. *v.* Blackiston et al. (1879) 7 Ore. 143.

or shall they concoct some arbitrary rule of thumb to enable the landowner or those claiming under him to defraud the chattel claimant? There exists no consideration of justice or policy, nor any technical principle of law which combats the chattel claimant's right. The courts accordingly have held that between the parties and as far as volunteers and purchasers with notice are concerned the agreement shall be effective to make the "fixture" a separate chattel.[1]

V. *Heir of Deceased Owner of Land in Fee vs. Personal Representative of the Landowner.*

The question in this type of case is: Shall the article go with the land to the heir or shall it be treated as a chattel and hence personalty? There would seem to be no reason why the deceased landowner's actual intention should not be made the decisive test in this sort of controversy.[2] It is erroneous to suppose that

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[1] "They were not so absorbed or merged in the realty, that their identity as personal chattels was lost; and unless such an effect has been produced, there is no reason in law or justice for refusing to give effect to the agreement, by which they were to retain their original character." Per Denio, J. in Ford *v.* Cobb et al. (1859) 20 N. Y. 344 at p. 352; District Township of Corwin *v.* Moorehead (1876) 43 Ia. 466; Howard *v.* Fessenden (1867) 14 Allen 124; Dolliver *v.* Ela (1880) 128 Mass. 557; Manwaring *v.* Jenison (1886) 61 Mich. 117; Merchants' National Bank *v.* Stanton (1893) 55 Minn. 211; Tyson et al. *v.* Post (1888) 108 N. Y. 217; Fortman *v.* Goepper et al. (1863) 14 Oh. St. 558; Fischer et al. *v.* Johnson, Lane & Co. et al. (1898) 106 Ia. 181; Ham *v.* Kendall (1873) 111 Mass. 297; Ingersoll *v.* Barnes (1881) 47 Mich. 104; Crippen *v.* Morrison (1864) 13 Mich. 23; see also cases under IX.

The agreement that the object shall remain a chattel need not be expressed; it may be implied from the circumstances of the case; and apparently, in the absence of evidence to the contrary, the mere facts that the chattel claimant annexed the "fixture" for his own use as licensee of the landowner will constitute prima facie evidence of an agreement that it should remain the chattel of the licensee: Fischer et al. *v.* Johnson, Lane & Co. et al., *supra;* Howard *v.* Fessenden, *supra;* Merchants' National Bank *v.* Stanton, *supra.*

If the chattel claimant acquiesces in the attachment of his chattel to land in such a manner that it becomes apparently an "improvement" although the landowner has consented to the annexation, the chattel claimant will not be entitled to claim the "fixture" as a chattel unless the land owner has expressly or impliedly agreed that it shall remain a chattel; because in such a case the natural interpretation of the facts would be that the landowner permits the chattel to be annexed with the understanding that it shall become part of the land. Monroe *v.* Armstrong et al. (1901) 179 Mass. 165; McLaughlin *v.* Nash (1867) 14 Allen 136; Washburn et al. *v.* Sproat (1820) 16 Mass. 449; Hinkley & Egery Iron Co. *v.* Black (1880) 70 Me. 473; Morrison *v.* Berry (1880) 42 Mich. 389; Jenks et al. *v.* Colwell et al. (1887) 66 Mich. 420.

[2] With the exception of cases in which the landowner has made an agreement with another that the "fixture" shall remain a chattel there is seldom any direct evidence of the landowner's intent. Necessarily, therefore, in the great majority of cases, only his "reasonably presum-

to establish such a test is to give the landowner the power to make certain of his property realty or personalty at his caprice. The effect of the rule simply is that if the landowner treats objects of property of a certain class as "improvements" on the land, in the absence of superior conflicting rights of others the courts will treat them in the same way. The result is that in a controversy between heir and administrator the articles in question go with the land to the heir if they are part of the land; otherwise not. If they go to the heir, they are real property; but they are not real property because of a specific intent of the landowner to that effect.

VI. *Grantor of Land vs. His Grantee; Mortgagor vs. Mortgagee (As to What Property Mortgage Covered at Time Conveyance Took Effect); Personal Representative of Deceased Landowner vs. Devisee.*

In this type the question is: What does the conveyance properly construed cover? Sometimes the wording of the conveyance is such that the articles pass under it without any question as to whether or not they are part of the land being material to a decision.[1] When, however, the articles must be brought within the term "land" or its equivalent in order to be included within the scope of the conveyance, a decision of the case necessarily rests upon the question whether or not the object shall be treated as part of the land. When the party claiming under the convey-

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able intent" can be ascertained. The statements found in some of the cases to the effect that the actual intent of the landowner is immaterial are either (as for instance in Snedeker *v.* Warring (1854) 12 N. Y. 170) merely decisions that his secret intent cannot be permitted to overcome his "reasonably presumable intent" in a controversy against certain classes of persons who had no notice of it; or they are mere dicta based on an erroneous idea that to give effect to the actual intent of the landowner would be to permit him to give to real property the legal attributes of personality and vice versa at his own pleasure.

Frequently it has been stated that the rule is the same between heir and personal representative, personal representative and devisee, and grantor and grantee. The rule should be the same as far as the heir and the devisee are concerned; they are both volunteers and both therefore should be bound by the actual intent of the deceased landowner; but a grantee for value should only be bound by the "reasonably presumable intent." Of course even between grantor and volunteer grantee, the "parol evidence" rule will render immaterial evidence of oral stipulations made at the time the grant was made.

For examples of cases involving respective rights to "fixtures" of heir and personal representative, see: Bishop *v.* Bishop (1854) 11 N. Y. 123; Bainway *v.* Cobb (1868) 99 Mass. 457; Kinsell *v.* Billings (1872) 35 Ia. 154.

[1]See: Farrar *v.* Stackpole (Me. 1829) 6 Greenl. 154.

ance is a volunteer, there is no reason why the same criterion should not be applied as in cases between heir and personal representative. When the person claiming under the conveyance is not a volunteer, however, the rule of "construction" I have mentioned before would operate to make the "reasonably presumable intent" the criterion.[1]

VII. *Landowner vs. Sheriff who Has Levied on His Alleged Improvements as Chattels; or vs. Purchaser at Execution Sale.*

The question in this type of case is: Shall the objects be treated as separate chattels for purposes of execution as against the landowner in favor of his creditors or shall they be treated as "improvements" on the land?[2] Public policy seems to require that in a case of this sort the decision should not turn on the secret intent of the landowner. The sheriff should be able to tell from external appearances what is land and what not. Furthermore, to give effect to the secret intent of the landowner would open the door to litigation and fraud. Probably "the reasonably presumable intent" of the landowner is the rule in this type of case.

VIII. *Rights of a Mortgagee of Land in "Fixtures" Annexed to the Land After He has Taken His Mortgage.*

In this type of case the question concerns the extent of the mortgagee's rights in the land. In some states, of which Massa-

[1] See: Mott *v.* Palmer (1848) 1 N. Y. 564; Snedeker *v.* Warring (1854) 12 N. Y. 170; Wadleigh *v.* Janvrin (1860) 41 N. H. 503; Smyth *v.* Sturges (1888) 108 N. Y. 495; Dolliver *v.* Ela (1880) 128 Mass. 557.

When the question is simply the effect of the conveyance, of course, the "parol evidence" rule renders immaterial evidence of oral stipulations between the parties at the time of the conveyance or negotiations. Leonard *v.* Clough et al. (1892) 133 N. Y. 292; Noble *v.* Bosworth (1837) 19 Pick. 314.

For examples of controversies as to the effect of a conveyance or mortgage of land on "fixtures" see: Teaff *v.* Hewitt (1853) 1 Oh. St. 511; The Ottumwa Woolen Mill Co. *v.* Hawley (1876) 44 Ia. 57; Goodrich *v.* Jones (N. Y. 1841) 2 Hill 142. Cf. Harris *v.* Scovel (1891) 85 Mich. 32; McRea *v.* Central Nat. Bank of Troy (1876) 66 N. Y. 489; Smith *v.* Blake (1893) 96 Mich. 542; Union Bank *v.* Emerson (1818) 15 Mass. 159; Kennard *v.* Brough et al. (1878) 64 Ind. 23; Potter *v.* Cromwell (1869) 40 N. Y. 287; MeKeage *v.* Hanover Fire Insurance Co. (1880) 81 N. Y. 38; Weston *v.* Weston (1869) 102 Mass. 514; Jenkins et al. *v.* McCurdy (1880) 48 Wis. 628; Freeland *v.* Southworth (1840) 24 Wend. 191.

[2] For cases involving this question see Voorhis *v.* Freeman (Pa. 1841) 2 Watts & Sergeant 116; Murdock *v.* Gifford (1858) 18 N. Y. 28; Rice *v.* Adams (Del. 1847) 4 Harr. 332; The Cong. Soc. of Dubuque *v.* Fleming (1861) 11 Ia. 533; Kelley *v.* Border City Mills (1879) 126 Mass. 148.

chusetts is an instance, a mortgagee is regarded at law as the owner of the land. The rights of use and occupation of the mortgagor are but little greater than those of a tenant at will. Even before foreclosure or default, the mortgagee may sue at law either the mortgagor or a stranger for any damage to the premises or any removal of "improvements."[1] It is very natural that courts entertaining this conception of the mortgagee's rights in the land should hold that when the mortgagor places articles on the premises of such a nature and in such a manner that if there existed no mortgage, the presumption would be that they were "improvements," the mortgagor will not be permitted to deny that they are such and subject to the mortgage.[2] Since a mortgagor cannot cause a "fixture" apparently an "improvement" to be treated as a separate chattel against the claims of the mortgagee, a conditional vendor of a chattel or a chattel mortgagee cannot make effective against the land mortgagee an agreement with the land mortgagor that the chattel shall be treated as a chattel after it has become apparently an "improvement" on the land; nor can any chattel claimant enforce against the mortgagee his claims to a "fixture" which has been placed in this situation with his acquiescence unless the mortgagee has expressly or impliedly promised to treat it as a chattel.[3]

In other states, of which New York is an illustration, the mortgagee, before foreclosure, is treated as a mere lienor; the mortgagor is regarded as the real owner both at law and in equity. Before foreclosure proceedings, the mortgagee can bring no suit against the mortgagor or a third person for dismantling the premises of improvements unless his security is threatened.[4] If he can show that the acts of the tenant or the

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[1] Wilbur *v.* Moulton (1879) 127 Mass. 509; Wilmarth *v.* Bancroft (1865) 10 Allen 348.

[2] Southbridge Savings Bank *v.* Mason (1888) 147 Mass. 500; McConnell *v.* Blood (1877) 123 Mass. 47.

The mortgagor's intent to treat "fixtures" in class (3) not apparently "improvements" as chattels will be effective in favor of a chattel claimant. Carpenter *v.* Walker et al. (1886) 140 Mass. 416; Maguire *v.* Park (1885) 140 Mass. 21.

[3] Thompson *v.* Vinton (1876) 121 Mass. 139; Hunt *v.* Bay State Iron Co. et al. (1867) 97 Mass. 279; Meagher *v.* Hayes et al. (1890) 152 Mass. 228; Tarbell *v.* Page (1892) 155 Mass. 256; Clary *v.* Owen et al. (1860) 15 Gray 522; Lynde *v.* Rowe, Jr. et al. (1866) 12 Allen 100.

If the land mortgagee waives his rights either before or after annexation and consents to the retention of title to the "fixture" as a chattel, the chattel claimant may take the "fixture" free from the lien of the land mortgage. Bartholomew *v.* Hamilton et al. (1870) 105 Mass. 239; Hawkins *v.* Hersey (1894) 86 Me. 394.

[4] Peterson *v.* Clark (N. Y. 1818) 15 Johns. 205.

third party tend to defraud him of his security, he may obtain aid from equity by injunction or otherwise.[1] The mortgagor has the power as against the mortgagee before foreclosure to determine the question whether or not any chattel in class (3) shall be treated as an "improvement." Therefore in these states a third person's claims to a "fixture" as a chattel, before foreclosure, are not affected by the land mortgage.[2] At the time of foreclosure proceedings the land mortgagee will be given a claim on the "fixtures" prior to that of the mortgagor; and prior to that of other chattel claimants in so far as a removal of the "fixtures" will damage the remainder of the premises causing a diminution of their value below the amount of the mortgage debt.[3]

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[1] Van Pelt *v.* McGraw (1850) 4 N. Y. 110.

[2] Tifft *v.* Horton (1873) 53 N. Y. 377; (Cf. the later case of McFadden *v.* Allen et al. (1892) 134 N. Y. 489, in which it was held that the chattel claimant by fraud and laches was estopped from successfully enforcing his claims to the "fixtures"; Sheldon et al. *v.* Edwards (1866) 35 N. Y. 279; Crippen *v.* Morrison (1864) 13 Mich. 23; Merchants' Nat. Bank *v.* Stanton (1893) 55 Minn. 211; Northwestern Mut. Life Ins. Co. *v.* George et al. (1899) 77 Minn. 319; Binkley *v.* Forkner et al. (1888) 117 Ind. 176; The N. Y. Invest. & Improv. Co. *v.* Cosgrove et al. (1901) 47 N. Y. App. Div. 35; aff'd. without opinion 167 N. Y. 601. Apparently the English law effects the same practical result between chattel conditional vendor or mortgagee and prior land mortgagee: See cases collated and commented upon in 15 L. Quart. Rev. 165.

[3] Binkley *v.* Forkner et al. *supra;* Northwestern Mut. Life Ins. Co. *v.* George et al., *supra;* The Bass Foundry and Machine Works *v.* Gallentine et al. (1884) 99 Ind 525; Davidson *v.* Westchester Gas Light Co. (1885) 99 N. Y. 558.

The extent of a land mortgagee's rights over the land before foreclosure varies greatly in detail in the different states. I have given Massachusetts and New York as typical examples of the two extremes. Between these two extremes—one representing the minimum of control under the strictest application of the "lien theory" and the other the very extensive rights under the old "legal title" common-law theory—there exist various slightly differing grades. The differences in detail often are due to statutes. It must not therefore be surmised that in every state where the "lien theory" of a mortgage on land prevails the mortgagee has as little control over "fixtures" as he does in New York; nor that in every State where the "common law theory" prevails the mortgagee has the same large control over "fixtures" that he has in Massachusetts. It is perfectly consistent with the maintenance of the "lien theory" in a less radical form to hold it a duty of the mortgagor to subject apparent improvements which he makes on the land to the lien of the mortgage and a right of the mortgagee to claim priority for his lien over these improvements; in other words the change of the mortgagor's rights from equitable to legal does not necessarily work radical difference in the substance of the rights; nor does an adherence to the "legal title theory" necessarily mean that the mortgagee has the same full measure of authority over the land that he has in Massachusetts. We should not be surprised therefore to find that in Vermont, where the "legal title theory" of a mortgage prevails, one who has gone into possession of land and erected valuable improvements under license from a mortgagor has a right to the improvements superior to that of the land

IX. *Chattel Claimant Who Has Acquiesced in the Annexation of a Chattel to Land Under Agreement with Landowner That It Shall Remain a Chattel vs. Subsequent Grantee, or Mortgagee, Who Has Paid Value and Taken His Interest in the Land without Notice Actual or Constructive of Chattel Claimant's Rights.*

Independent of the recording acts, there is no reason why the chattel claimant should not prevail in this type of controversy. At common law a man was bound to take note at his peril of the validity or invalidity of his vendor's title. Therefore, though the chattels are of such a nature and so annexed to the land that they would pass under the conveyance if they belonged to the mortgagor or vendor, there is no reason, independent of the recording acts, why legal rights of third persons in these chattels should be barred by the conveyance. Our recording acts, however, require that certain contracts and conveyances affecting land shall be recorded in order to be effective against purchasers of the land for value without notice; and the courts of most of our states deem that the policy established by these acts[1] demands that interests in "fixtures" apparently a part of the land, shall appear on the land records in order to be effectual against per-

mortgagee (Paine *v.* McDowell et al. (1898) 71 Vt. 28; and see also Campbell et al. *v.* Roddy et al. (1888) 44 N. J. Eq. 244); nor that in Wisconsin where the "lien theory" of a mortgage is established, the mortgagee has the same priority of claim to "fixtures" placed upon the land after the mortgage is given that he has in Massachusetts. Fuller-Warren Co. *v.* Harter (1901) 110 Wis. 80. See also, The State Savings Bank *v.* Kercheval (1877) 65 Mo. 682. My purpose in this section has been merely to show that the principles underlying the cases of type VIII are not peculiar to the law of "fixtures" nor in any respect anomalous; but depend upon the view which is taken of the rights of the mortgagee over the land before foreclosure in the particular jurisdiction in question. According as his rights are broad or narrow, so will the power of determining, whether an apparent improvement in class (3) shall be treated as a chattel or as a part of the land, be his. This part of the law of "fixtures" then is really a part of the law of mortgages.

A vendor under a contract for the conditional sale of land providing for possession by the vendee until default, is in a position analogous to that of a land mortgagee; and his rights in "fixtures" put upon the land by the vendee are generally fashioned by the same principles. See and cf. with the cases cited above: Westgate *v.* Wixon (1880) 128 Mass. 304; McLaughlin *v.* Nash. (1867) 14 Allen 136; Hinkley & Egery Iron Co. *v.* Black (1880) 70 Me. 473; Ogden *v.* Stock (1864) 34 Ill. 522; Taylor *v.* Collins et al. (1881) 51 Wis. 123; Burrill *v.* Wilcox Lumber Co. et al. (1887) 65 Mich. 571; Harris *v.* Hackley (1901) 127 Mich. 46. See also Miller *v.* Wilson et al. (1887) 71 Ia. 610 (Land purchase money-lienor *v.* mortgagees of chattel annexed by the purchaser of the land.)

[1] It is to be noted that the law of conditional sales of chattels and requirements that chattel mortgages be recorded also affect this type of cases.

sons protected by these statutes.[1] The courts of New York and perhaps of some few other states apparently do not agree in this judicial extension of the effect of the recording acts and therefore permit the chattel claimants to enforce their rights even against purchasers for value without notice.[2]

X. *Landlord vs. Tenant: Personal Representative of Tenant for Life vs. Remainderman or Reversioner.*

The question which most frequently arises in this type of cases is not whether the object in litigation has become a part of the land, but whether, even though it is a part of the land, the tenant or personal representative has a right to remove it at the end of or during the term.[3] It is clear that the tenant or his

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[1] Brennan et al. *v.* Whitaker et al. (1864) 15 Oh. St. 446; Trull *v.* Fuller (1848) 28 Me. 545; Thomson *v.* Smith (1900) 111 Ia. 718 (Court relies somewhat on a section of the Iowa Code concerning conditional sales of chattels); Stillman *v.* Flenniken (1882) 58 Ia. 450; Bringholff *v.* Munzenmaier et al. (1866) 20 Ia. 513; Powers *v.* Dennison et al. (1858) 30 Vt. 752; South Bridge Savings Bank *v.* Stevens Tool Co. (1881) 130 Mass. 547; Smith Paper Co. *v.* Servin (1881) 130 Mass. 511; Southbridge Savings Bank *v.* Exeter Machine Works (1879) 127 Mass. 542; Ridgeway Stove Co. *v.* Way (1886) 141 Mass. 557. Cf. Jennings *v.* Vahey (1903) 183 Mass. 47; and Wentworth et al. *v.* Woods Machine Co. et al. (1895) 163 Mass. 28; Pierce et al. *v.* George (1871) 108 Mass. 78; Watson *v.* Alberts (1899) 120 Mich. 508; Wickes Bros. *v.* Hill (1897) 115 Mich. 333; Knowlton et al. *v* Johnson (1877) 37 Mich. 47; Manwaring *v.* Jenison (1886) 61 Mich. 117; and Johnson *v.* Bratton (1897) 112 Mich. 319; Hobson *v.* Goringe [1897] 1 Ch. Div. 182 (accord as to practical result).

[2] Ford *v.* Cobb et al. (1859) 20 N. Y. 344; Mott *v.* Palmer (1848) 1 N. Y. 564; Hilborne *v.* Brown (1835) 12 Me. 162; Warren *v.* Liddell (1895) 110 Ala. 232; Cross *v.* Marston (1845) 17 Vt. 533.

[3] The fact that a chattel which has been annexed to the land by the tenant of a particular estate in such a manner that if the tenant owned the land in fee, the presumption would be that the "fixture" was part of the land, (with the exception of "trade fixtures") cannot be removed during or at the end of his term, is one phase of the obligations and rights which exist between a tenant of a particular estate and the landlord, reversioner, or remainderman. From a study of the old law of waste it may be gathered that the law placed upon the tenant in possession (unless he was dispunishable for waste) the duty of preserving the property for the owner of the estate of inheritance. He could make no change in its general physical characteristics; nor build new buildings; nor suffer buildings or improvements to fall to ruin for lack of repairs without being liable to the action of waste with its grievous penalties. If he did build a new building, and then pulled it down or suffered it to fall into decay he was guilty of two separate acts of waste. The building became part of the land when it was erected and tearing it down would lay the tenant open to another charge of waste. (Co. Lit. 53a and 53b.) It would be at variance with the policy which was behind these rules to permit the tenant to claim as chattels the apparent improvements he might make on the premises. Hence the old law ignored the actual intent of the tenant to treat these apparent improvements as his separate chattels. The old law of waste has been tempered con-

representative can claim as chattels all things which the tenant has placed on the land and which are not of such a nature and so attached that they would be regarded as "improvements" if the controversy were between vendor and vendee as to what the term "land" included.[1] Things which would be regarded as "improvements" in such a controversy according to the weight of authority, are regarded as part of the land before severance by the tenant even though they fall within that class of "fixtures" which a tenant is permitted by law to remove during or at the expiration of his term, in the absence of any stipulation concerning them.[2] The tenant cannot treat "fixtures" of this sort as chattels separate from the land without an express or implied agreement with the landlord, reversioner, or remainderman that he may do so;[3] nor in the absence of agreement can he remove such "fixtures" with the exception of "trade fixtures." These he may remove during or at the end of the term or while he continues in possession rightfully; or if his tenancy is of uncertain duration, within a reasonable time after its termination; unless he has expressly or impliedly waived his right to do so.[4]

siderably in the course of time; and it should be noted that it is with respect to controversies over "fixtures" of this type that a "relaxing of the rigor" of the old rule in favor of the tenant may be predicated. The present law of "fixtures" evidences a liberal construction of the right of the tenant to remove "trade fixtures" (See Van Ness *v.* Pacard (1829) 2 Peters 137) and fairness to the tenant in classifying objects claimed as chattels used as furniture or for domestic purposes. Generally speaking, justice is done between the parties in spite of the fact that the old criterion for determining whether or not a "fixture" is an "improvement" on the land is still adhered to. (See Chap. V. "Ewell on Fixtures.")

[1] Guthrie et al. *v.* Jones (1871) 108 Mass. 191; O'Donnell *v.* Hitchcock et al. (1875) 118 Mass. 401; Park *v.* Baker (1863) 7 Allen 78; Roth *v.* Collins (1899) 109 Ia. 501; Hellawell *v.* Eastwood (1851) 6 Ex. 295; Bernheimer *v.* Adams (1902) 70 N. Y. App. Div. 114, aff'd. without opinion 175 N. Y. 472.

[2] See: Mackintosh *v.* Trotter (1838) 3 M. and W. 184; Gibson *v.* Hammersmith (per Kindersley V. C.) (1863) 32 L. J. (N. S.) Ch. 337; Raddin *v.* Arnold (1874) 116 Mass. 270; Brown et al. *v.* Wallis (1874) 115 Mass. 156; Bernheimer *v.* Adams, *supra.*

[3] If there is an agreement between the tenant and the remainderman, reversioner, or landlord to that effect, objects in class (3) will be treated as chattels of the tenant; and an agreement in the lease that the tenant shall have the right to remove "fixtures" is generally so interpreted as to make the "fixtures" covered by its terms the tenant's chattels even before severance. Booth *v.* Oliver (1888) 67 Mich. 664; Korbe *v.* Barbour (1881) 130 Mass. 255; Morris *v.* French et al. (1871) 106 Mass. 326; Jones *v.* Cooley (1898) 106 Ia. 165; Conde *v.* Lee (1900) 55 N. Y. App. Div. 401, aff'd. without opinion 171 N. Y. 662.

[4] Buckland *v.* Butterfield et al. (1820) 2 Brod. & Bingh. 54; Elwes *v.* Maw (1802) 3 East 38; Overman *v.* Sasser (1890) 107 N. C. 432; Van Ness *v.* Pacard, *supra*; Guthrie et al. *v.* Jones (1871) 108 Mass. 191; Conrad *v.* Saginaw Mining Co. (1884) 54 Mich. 249; Clark *v.* Howland et al. (1881) 85 N. Y. 204; Ombony & Dain *v.* Jones (1859) 19 N. Y. 234.

If he once waives this right to a "fixture" the right to that "fixture" is gone.[1]

If I have made myself understood, it should appear that the several types of cases involving controversies over "fixtures" are not alike, either with respect to the questions at issue or the considerations by which the solution of these questions is dictated. It should likewise appear that there is little in the principles of law underlying the decisions of these cases that is peculiar to "The Law of Fixtures." I hope I have also manifested that the law of "fixtures" is not an indigestible potpourri of confusing decisions made from the fragments of an ancient technical rule, and various unclassified exceptions thereto, but is a consistent, easily comprehensible body of principles, which have been evolved by as full an exercise of common sense as has been displayed in the development of any part of our common law.

JOSEPH W. BINGHAM.

ITHACA, N. Y.

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[1] See: Linahan *v.* Barr (1874) 41 Conn. 471; White *v.* Arndt (Pa. 1836) 1 Wharton 91; McIver et al. *v.* Estabrook et al. (1883) 134 Mass. 550; Duffus *v.* Bange et al. (1890) 122 N. Y. 423; Talbot *v.* Cruger (1896) 151 N. Y. 117; Thorn *v.* Sutherland et al. (1890) 123 N. Y. 236; Kerr et al. *v.* Kingsbury et al. (1878) 39 Mich. 150; Watriss *v.* First National Bank of Cambridge (1878) 124 Mass. 571; Stokoe *v.* Upton (1879) 40 Mich. 581; Dostal *v.* McCadden et al. (1872) 35 Ia. 318.

The tenant has no right to remove even trade fixtures if their removal will seriously damage the premises. Collamore *v.* Gillis (1889) 149 Mass. 578; O'Brien *v.* Kusterer (1873) 27 Mich. 289 [Cf. Hanrahan *v.* O'Reilly 1869) 102 Mass. 201]; Powell *v.* McAshan et al. (1859) 28 Mo. 70.